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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
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8 DANIEL ANDRADE-MENDOZA,
9 Petitioner,
10 vs.
11 ISIDRO BACA, *et al.*,
12 Respondents.

3:15-cv-00280-HDM-WGC

13 **ORDER**
14

15 On July 16, 2015, the court ordered that it had examined the habeas corpus petition of the
16 petitioner, Daniel Andrade-Mendoza, pursuant to Rule 4 of the Rules Governing Section 2254 Cases
17 in the United States District Courts, and found it to be defective, in that Andrade-Mendoza has not
18 exhausted, in state court, any claim cognizable in this federal habeas corpus action. *See Order*
19 entered July 16, 2015 (ECF No. 5). The court granted Andrade-Mendoza an opportunity to show
20 cause why this action should not be dismissed. *See id.*

21 On August 12, 2015, Andrade-Mendoza filed a response to the order to show cause
22 (ECF No. 9), and a motion for appointment of counsel (ECF No. 8).

23 On September 23, 2015, the court ruled that Andrade-Mendoza did not show cause why this
24 case should not be dismissed. *See Order* entered September 23, 2015 (ECF No. 10). The court
25 denied the motion for appointment of counsel, dismissed this action without prejudice, and denied
26 Andrade-Mendoza a certificate of appealability. *See id.; see also Judgment* (ECF No. 11).

1 Andrade-Mendoza's response to the order to show cause failed to show that he has exhausted
2 in state court any claim that might be cognizable in this federal habeas corpus action. No such claim
3 was exhausted on his direct appeal, and his first state habeas action remains pending in the state
4 district court.

5 Andrade-Mendoza complained that his appellate counsel was ineffective in not raising any
6 federal constitutional claims on his direct appeal, but, as the court stated in its September 23 order,
7 any claim of ineffective assistance of appellate counsel must be exhausted in Andrade-Mendoza's
8 state habeas action, which remains pending, before he may assert such a claim in a federal habeas
9 corpus action.

10 Andrade-Mendoza requested that this federal action be stayed. In some cases a federal
11 district court may permit the filing of a federal habeas petition even though it contains no claims
12 exhausted in state court. *See Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005); *Bonner v. Carey*, 425
13 F.3d 1145, 1149 n.20 (9th Cir.2005). In *Pace*, the Supreme Court stated that a petitioner might file
14 "a 'protective' petition in federal court and [ask] the federal court to stay and abey the federal habeas
15 proceeding until state remedies are exhausted." *Pace*, 544 U.S. at 416. "A petitioner's reasonable
16 confusion about whether a state filing would be timely will ordinarily constitute "good cause" for
17 him to file in federal court." *Id.* In the September 23 order, the court found that there is no showing
18 of any reason for confusion regarding the timeliness of Andrade-Mendoza's pending state habeas
19 action. The court stated that Andrade-Mendoza's federal habeas petition simply appears to be
20 premature, and there is no showing of good cause for a stay of this action. *See Order entered*
21 *September 23, 2015 (ECF No. 10).*

22 On October 1, 2015, Andrade-Mendoza filed a "Motion to Reconsider, Rule 8(e), Rule 11(e),
23 or, in Alternative, Motion to Make Additional Findings, Rule 52(b)" (ECF No. 12). Respondents
24 filed an opposition to the motion for reconsideration on October 6, 2015 (#13). Andrade-Mendoza
25 filed a reply on October 15, 2015 (ECF No. 14).

26 On October 21, 2015, Andrade-Mendoza filed a notice of appeal (ECF No. 15).

1 The court construes Andrade-Mendoza’s October 1, 2015, motion as a motion for
2 reconsideration, made pursuant to Federal Rules of Civil Procedure 59(e) and 60(b), and denies it.
3 Andrade-Mendoza’s claims remain wholly unexhausted. He does not show there to be an “absence
4 of available State corrective process,” or “circumstances ... that render such process ineffective to
5 protect” his rights. *See* 28 U.S.C. § 2254 (b)(1)(B). Andrade-Mendoza had a direct appeal, in which
6 he did not exhaust any claim cognizable in this federal habeas corpus action, and he is currently
7 litigating a state habeas corpus action. Andrade-Mendoza has shown no cause for reconsideration of
8 the September 23, 2015, order, and judgment.

9 **IT IS THEREFORE ORDERED** that petitioner’s “Motion to Reconsider, Rule 8(e), Rule
10 11(e), or, in Alternative, Motion to Make Additional Findings, Rule 52(b)” (ECF No. 12) is
11 **DENIED.**

12 Dated this 22nd day of October, 2015.

Howard D McKibben

UNITED STATES DISTRICT JUDGE